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No. 09-1553

Supreme Court, U.S.
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In The

Supreme Court of the United States

CLAUDE DAVID CONVISSER, ESQ.,

Petitioner,

v.

DISCIPLINARY BOARD OF THE SUPREME COURT OF NEW MEXICO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION

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PETITIONER'S MISSTATEMENTS OF QUESTIONS PRESENTED

1. Petitioner's statement that the New Mexico Supreme Court violated his First Amendment rights by imposing discipline for his petitioning activity is not true and has no basis in fact. Similarly, petitioner's statement that a reviewing officer ordered charges to be filed because of her objection to Convisser's petitioning activity is an outright falsehood.

2. Petitioner's statement that disciplinary counsel engaged in vindictive prosecution has no basis in fact. Similarly, disciplinary counsel's recommendations of disbarment were based on petitioner's repetitive acts of misrepresentation and outright dishonesty which continue unabated. There is no credible reason why disciplinary counsel would want to punish respondent for his petitioning activity or become involved in that issue and none has been advanced.

3. Petitioner's assertion that he was selected for prosecution because of the exercise of his First Amendment rights is not true and has no basis in fact.

4. Petitioner's assertion that the New Mexico Supreme Court impaired his substantive due process rights has no basis in fact.

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STATEMENT OF THE CASE

Perhaps the most difficult task in the practice of law is responding to arguments that contain half-truths, misrepresentations and the utilization of matters out of context for it compels the responding attorney to spend time and space correcting the matters presented instead of dealing with the case on its merits. Unfortunately, this case presents such a situation in that the truth does not appear to be a constraining factor on petitioner.

This matter arises out of a complaint filed with the Disciplinary Board of the Supreme Court of New Mexico by Jeff Harbour, an officer and board member of EcoVersity, an institution teaching sustainable living and Prajna Foundation, its funding source. Frances Harwood, who died in 2003, was the founder and benefactor of EcoVersity and Prajna. The complaint arose primarily from a meeting between Harbour and petitioner in April 2007, held at petitioner's request. In the course of the meeting, petitioner advised Harbour that the Estate of Frances Harwood had not been properly closed, that Harbour, as executor could still be sued for breach of fiduciary duties in connection with the administration of the estate and that the will appeared to have been procured as a result of Harbour's undue influence. Petitioner further stated that he represented clients who were prepared to join in a lawsuit against Harbour but that if Harbour would turn over control of EcoVersity and Prajna to petitioner, the claims would not be pursued.

At the time of the meeting, petitioner was not admitted to practice in New Mexico and did not represent anyone with standing to sue Harbour. Contrary to petitioner's statements to Harbour, the estate was properly closed. Prior to the meeting, petitioner tried unsuccessfully to convince Sybil Harwood, Frances Harwood's sister, to retain petitioner to sue Harbour and mailed her a retainer agreement. At the time of the solicitation of Sybil Harwood, petitioner was not yet admitted to practice in New Mexico and was on inactive status in Virginia.

Subsequent to the review of this matter by a reviewing officer, a four count Specification of Charges (Petitioner's Appendix I) was filed. Count I alleges that petitioner misrepresented to Jeff Harbour (the complainant) and the Attorney General that the Estate of Francis Harwood had not been properly closed and that the statute of limitations on a claim against Harbour for breach of fiduciary duty against Harbour as executor had therefore not run.

The hearing committee, consisting of two attorneys and one lay member appointed by the disciplinary board, found with respect to Count I that petitioner's misrepresentations violated Rule 16-804(C) NMRA prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation.

Count II alleges that respondent violated Rule 16-505(A) NMRA by engaging in the unauthorized practice of law in connection with his solicitation of Sybil Harwood and his meetings with Harbour. The

hearing committee found that respondent's conduct violated Rule 16-505(A) NMRA.

Count III alleges that petitioner violated Rules 16-804(C) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 16-804(H) (conduct adversely reflecting on petitioner's fitness to practice law) by falsely stating to Harbour that he represented clients or claimants with standing to sue when in fact he did not represent anyone with standing. The hearing committee found that petitioner did not in fact represent anyone with standing to sue and that his statements violated Rule 16-804(C) NMRA.

Count IV alleges that petitioner violated Rules 16-804(C) and 16-804(H) NMRA by using an unsigned affidavit in connection with a complaint filed with the Attorney General and referring to the affidavit as if it were signed. The hearing committee found that respondent's use of the unsigned affidavit violated Rule 16-804(C).

The foregoing findings were affirmed by a hearing panel consisting of three members of the Disciplinary Board. Where the hearing panel departed from the recommendations of the hearing committee was in the recommendations for discipline. The hearing committee recommended that petitioner be suspended for an indefinite period with reinstatement subject to a mental health evaluation as to petitioner's ability and fitness to practice law. The hearing panel recommended a one-year suspension with the requirement of a mental health evaluation and

imposed additional requirements regarding the evaluation. The hearing panel also imposed a period of supervised probation following petitioner's reinstatement.

Upon review of this matter by the New Mexico Supreme Court, the Court ordered that petitioner be suspended for one year, that the suspension be deferred on condition that petitioner observe and comply with all Rules of Professional Conduct and Rules Governing Discipline and that petitioner respond in a timely manner to any complaints filed against him and to requests from disciplinary counsel for additional information.

REASONS TO DENY WRIT

A. Petitioner's constitutional arguments are based on deliberate misstatements of the record

Petitioner's argument, that he was prosecuted for petitioning under Article II, Section 14 of the New Mexico Constitution, has no basis in fact. Petitioner was prosecuted because of the conduct he engaged in as alleged in the Specification of Charges, which conduct is undisputed. Petitioner misstates the record when he attributes the prosecution of this matter to the "animus" of the reviewing officer when the reviewing officer has clearly stated that respondent's attempt to carve out a role for himself as exemplified

by his petitioning activity is a matter best left for the courts. Petitioner's Appendix I, p.43a.

Finally, there is no credible reason why disciplinary counsel would want to punish petitioner for his petitioning activity or become involved in that issue and none has been advanced.

B. There was no vindictive prosecution in this case

Petitioner's argument of vindictive prosecution is based on the discipline requested, rather than the decision to prosecute itself. Clearly, disciplinary counsel's request that petitioner be disbarred is not too far off the mark since the hearing committee recommended indefinite suspension and the hearing panel suggested suspension for one year.

It is significant that the recommendations of both the hearing committee and the hearing panel that respondent undergo a mental health evaluation were not made at the instance of disciplinary counsel but, rather, were based on their own observations of petitioner in the course of the hearings and oral arguments.

C. The findings of fact are supported by substantial evidence

Petitioner argues that in reaching its decision the New Mexico Supreme Court ignored many facts that were admitted in evidence. In reviewing a substantial

evidence claim, the reviewing body does not look to see whether substantial evidence exists to support the opposite result, but whether such evidence supports the results reached. *In re Bristol*, 2006-NMSC-041, ¶16.

Petitioner has failed to demonstrate that the findings of fact were not supported by substantial evidence.

D. Petitioner's allegations of *ex parte* communications have no basis in fact and should be rejected out of hand

Petitioner speculates that the recommendation of the hearing committee that he have a mental health evaluation is a result of *ex parte* communications between the hearing committee and disciplinary counsel. Other than to say that respondent has apparently not considered that the recommendation is a result of his behavior, this argument is based solely on petitioner's imaginings and merits no further response.

E. There was no failure to notify petitioner of the charges against him

The hearing committee's conclusions of law (Petitioner's Appendix C) as set forth in paragraphs 20, 21, 22 and 23 track the allegations in Counts I, II, III and IV of the Specification of Charges. Petitioner has not been found to have violated any Rules not contained in the Specification of Charges nor were the

findings of Rules violations based on conduct not alleged in the Specification of Charges.

F. Petitioner had the opportunity to and did in fact conduct significant discovery in this case

Notwithstanding petitioner's contentions to the contrary, he conducted significant discovery in this case. First, pursuant to disciplinary counsel's open file policy, petitioner inspected disciplinary counsel's entire file (with the exception of work product) and copied significant portions of it. Petitioner deposed Walter Melendres, complainant's attorney, Jeff Harbour, the complainant, Amy Pilling, Diane Garrity and Marie Wilkinson. In addition to calling petitioner as a witness, disciplinary counsel called Mr. Harbour and Ms. Wilkinson. Thus, respondent not only inspected whatever documents were contained in disciplinary counsel's file but deposed all of the witnesses called by disciplinary counsel at the hearing of this matter.

CONCLUSION

In an effort to invoke the interest of this Court, petitioner has created constitutional issues where none in fact exist. There is simply no basis in the record for arguing, much less concluding, that petitioner was prosecuted for exercising his First Amendment rights or that he was denied due process or

equal protection of the law. Accordingly, the Petition should be denied.

Respectfully submitted,

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